IN THE

Supreme Court of the United States

October Term, 1958

No. 414

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

L. L. PRICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, L. L. PRICE.

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SUBJECT INDEX

TOPICAL INDEX

Statutes

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Questions Presented.

1. Does the denial by the National Railroad Adjustment Board of a claim for reinstatement and back pay by a discharged railroad employee preclude a court suit for damages by such employee?

If question 1 is answered in the affirmative, then a second question is presented as follows:

2. If the National Railroad Adjustment Board in denying the claim misconstrued it and did not decide it upon the merits, may the discharged employee file a court suit for damages?

Statement of the Case.

On July 12, 1949, respondent L. L. Price was a railroad trainman employed by petitioner Union Pacific Railroad Company in Las Vegas, Nevada. On that day Price reported for duty at 9:15 P.M. and was instructed to deadhead on a train to Nipton, California, for swing service (extra brakeman) [R. 20].[1]

Article 32(b) of the collective bargaining agreement between the railroad and Price's brotherhood provided that "Swing brakeman will not be tied up nor released at points where sleeping and eating accommodations are not available" [R. 9]. There was no place for trainmen to eat at Nipton from 8:00 P.M. to 6:00 A.M. [R. 45-46].

Price arrived at Nipton about 10:25 P.M. [R. 18]. He called the dispatcher in Las Vegas and was told to protect a train which would arrive at Nipton about 4:00 A.M., but to call in about 3:20 A.M. so that if another train was to arrive in time for the 4:00 A.M. train, he might be deadheaded back to Las Vegas [R. 17-18]. Price told the dispatcher that there was no place to eat or sleep at Nipton and that he was returning on the first eastbound train to Las Vegas [R. 18]. Shortly after midnight, Price called the dispatcher and said "I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton," and was told it would not be necessary [R. 24-25].

Commencing June 28, 1949, the railroad required swing brakemen to detrain at Nipton. Nipton was a station in desert terrain, infested with scorpions, rattlesnakes and other insects [R. 55]. Before that time the brakemen had

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[1]Record references are to the printed record.

been detrained at Kelso, California, where eating and sleeping accomodations were available [R. 43]. This action was vigorously protested by the trainmen as being violative of Article 32(b) [R. 43], and on July 6, 1949, Price's brotherhood caused to be docketed an application for mediation with the National Mediation Board [R. 38]. As a result, and on July 15, 1949, the brotherhood and the railroad entered into an agreement whereby swing brakemen would be detrained at Kelso instead of Nipton [R. 38-41, 43].

On July 16, 1949, Price was notified in writing by the assistant superintendent, W. B. Groome, that he was suspended and to report the following morning at 10 A.M. at his office in Las Vegas for investigation and hearings on charges that he refused to protect his assignment as a swing brakeman at Nipton, California, on July 12, 1949, when returned from Nipton to Las Vegas to eat, in violation of certain operating rules [R. 12-13].

Price appeared the following morning and requested a postponement until July 18 because his witness, a brakeman, was called to work by the railroad at 10 A.M. July 17, and Price did not want to pay him to lay off to attend as his witness [R. 24].[2] A postponement until 9:30 A.M. the following morning was granted [R. 14]. At that time Price appeared and requested a postponement until his representative, E. C. Grounds, the local chairman of his brotherhood [R. 14], was present in Las Vegas [R. 16]. Grounds, who worked for the railroad, had departed from Las Vegas the previous night at 8 o'clock [R. 23]. Groome, the assistant superintendent, directed Price to

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[2]The notice to Price stated "You may produce such witnesses as you may desire, at your expense."

appear at 2:30 P.M. that day and to get another representative [R. 16-17].

Price did not appear at 2:30 P.M. and Groome ordered the investigation and hearing to proceed without him [R. 17]. Thereupon, he and the trainmaster conducted the same [R. 12-29]. With the exception of the statements of S. M. Smith, Groome's clerk, with respect to Price's requests for postponement [R. 16-17, 23-24], the hearing dealt solely with Price's return from Nipton to Las Vegas for the purpose of eating [R. 12-29]. There apparently was no verbatim transcript of what occurred. All that exists is a series of brief questions and answers prepared by Groome's clerk for the signatures of witnesses [R. 12-29].

Article 33 of the collective agreement enjoined the fixing of punishment "without a thorough investigation" [R. 7]. Nevertheless, the so-called transcript indicates that each of the witnesses were called as witnesses for the railroad [R. 16-17, 19, 24, 26]. And at the end, it recites that Groome said, "As Brakeman Price, with his representative, did not appear at this investigation as directed there is no one present to present evidence or witnesses in his behalf. The investigation is closed . . ." [R. 29].

As a result of the hearing, Price was discharged by the railroad [R. 7]. He thereafter sought reinstatement with no impairment of rights and back pay, but the railroad refused reinstatement on such basis [R. 29-36].

Thereafter, Price's brotherhood submitted a claim in his behalf for similar relief to the National Railroad Adjustment Board. The submission argued (1) that the railroad ignored Article 33 by holding the hearing when it knew Price's representative was not available and requir-

ing him to pay his own witness, and (2) that Price was justified in leaving Nipton for food because of Article 32(b). The response of the railroad is not part of the record, but the rebuttal of the brotherhood deals primarily with the Article 32(b) issue, answering points raised in the railroad's response with respect to such issue [R. 42-56].

On June 25, 1952, the board made written findings, wrote an opinion, and denied the claim [R. 56-59]. However, it made no findings or comment with respect to Article 32(b) or Price's return to Las Vegas for food, except to state that "Claimant was found to have willfully disobeyed his orders" [R. 56-59].

On June 6, 1955, Price filed a complaint in this action alleging wrongful discharge in violation of a collective bargaining agreement, and prayed for money damages [R. 3-5]. The railroad denied the allegations of the complaint and as a separate defense set forth the proceeding before the board and alleged that it constituted a bar to the action [R. 68-72]. The railroad moved for summary judgment, which motion was denied after argument. Thereafter, the railroad moved for leave to move for summary judgment and after argument the motion was granted.

The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663 [R. 101]. The railroad's petition for rehearing was denied [R. 109].

Summary of Argument.

This Court has not ruled whether or not Section 3 First (m) of the Railway Labor Act (45 U. S. C. 153 First (m)), which provides that awards of the National

Railroad Adjustment Board "shall be final and binding upon both parties to a dispute except so far as they shall contain a money award," precludes a discharged railroad employee, whose claim for reinstatement has been denied by the board, from pursuing his common law remedy for damages by court suit. Such ruling was expressly reserved in *Elgin, Joliet and Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 718.

There is nothing in the legislative history of the 1934 Amendments to the Railway Labor Act, where the "final and binding" language appears, to evince an intent on the part of Congress that the exhaustion of the act's administrative remedy results in the loss of the employee's right to sue in court for damages. In *Moore v. Illinois Central R. R.* (1941), 312 U. S. 630, it was held that there was nothing in the act to take away from the courts jurisdiction to determine a controversy over the wrongful discharge of a railroad employee.

The act should not be construed so as to make the awards "final and binding" and bar court action by a discharged employee who lost before the board, because such a construction would result in unfairness and a denial of due process in that (1) it would deny an employee who lost before the board access to the courts and permit an employer who lost before the board the right to defend an enforcement suit in a proceeding *de novo;* (2) the proceedings before the board do not have adequate procedural safeguards; and (3) valuable contract rights would be taken by a non-governmental agency vested with full judicial power.

And even assuming an award of the board adverse to a discharged employee was "final and binding," if the board misconstrued the complaint of the employee and

did not determine it on its merits, the employee may pursue his common law action. As the board did misconstrue respondent's complaint and did not determine it upon the merits, he was not barred from bringing this action, and summary judgment should not have been granted.

ARGUMENT.

I.

A Determination by the National Railroad Adjustment Board That a Discharged Railroad Employee Was Not Entitled to Reinstatement Does Not Preclude the Employee From Suing in Court for Damages for Wrongful Discharge.

A. The "Finality" Provision of the Railway Labor Act Does Not Preclude Price's Suit.

Section 3, First (m) of the Railway Labor Act (45 U. S. C., Sec. 153, First (m)) provides that the awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The railroad contends the "final and binding" language of the section precludes Price's suit.

This Court has not ruled on whether or not the finality language makes the award of the board conclusive in a case of this nature. In *Elgin, Joliet & Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 718, this Court recognized the existence of the question, but as it remanded the case it deemed it unnecessary to resolve the question.

> ". . . We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed. Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question . . ."

In *Moore v. Illinois Central R. R.* (1941), 312 U. S. 630, 634, the railroad contended that the plaintiff could not bring an action for wrongful discharge in a state court until he had first exhausted the administrative proceeding provided under the Railway Labor Act (45 U. S. C. 153). In holding the exhaustion doctrine inapplicable, this Court said:

> ". . . We find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

How can the railroad's contention here be reconciled with this Court's language in the *Moore* case? Would not a holding that the "finality" language deprived the District Court of jurisdiction be a holding that Section 153, First (m) does take away the power of courts to decide a wrongful discharge claim and that *Moore* did not mean what it said? It is true that *Moore* was principally an exhaustion doctrine case, but the language and meaning are clear.

Even *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, which narrowed the possible broad scope of *Moore* by holding that the board had exclusive primary jurisdiction of grievances between a railroad and its employees requiring interpretation of collective agreements, said its decision was not inconsistent with its holding in *Moore* that the Railway Labor Act does not bar courts from adjudicating a suit claiming damages for wrongful discharge.

> ". . . As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful dis-

charge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees . . . ."

The railroad argues that the legislative history supports its contention and quotes a statement made by Commissioner Joseph B. Eastman (p. 21) with respect to proposed 1934 amendments to the Railway Labor Act. Respondent submits that the statement does not support the railroad's position. There is nothing in it indicating an intent to bar a discharged employee from prosecuting a claim for damages in court. Rather the statement is part of the legislative history of the 1934 amendments referred to by this Court in *Railroad Trainmen v. Chicago River & Indiana Railroad Company*, 353 U. S. 30, to reinforce its literal interpretation of Section 153 First (m) that either a railroad brotherhood or a carrier could submit a dispute to the board and the other side would be bound by the award.

In *Slocum v. Delaware, L. & W. R. Co., supra*, Mr. Justice Reed, in his dissent (pp. 246-247) stated:

". . . There is not a line in the statute, and so far as I can ascertain, not a suggestion in the hearings that the creation of the Adjustment Board was intended by Congress to close the doors of the courts to litigants with otherwise justiciable controversies."

In *Washington Terminal Co. v. Boswell* (1941), 124 F. 2d 235, affirmed *per curiam* by an equally-divided court, 319, U. S. 732 (1942), Justice Stephens, who wrote the dissent, stated, after reviewing the legislative history that (p. 269).

"It would seem more logical to conclude that it could hardly have been the intention of Congress to

exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the board . . ."

In *T. W. A. v. Koppal* (1953), 345 U. S. 653, a discharged employee of an air carrier did not appeal to company officials as required by the collective agreement. He filed suit in District Court and recovered a verdict. The District Court set the verdict aside and entered judgment for the carrier on the ground that plaintiff had not exhausted the administrative remedy provided in the contract and as required by Missouri law. The judgment was reversed by the Eighth Circuit and this Court reversed the Eighth Circuit, holding that if applicable state law requires exhaustion of administrative remedies under his employment contract he must show that he has done so before bringing an action for damages for wrongful discharge.

How can *T. W. A. v. Koppal,* be reconciled with the railroad's contention? *Moore* holds that exhaustion of the administrative remedy provided by the Railway Labor Act is not a prerequisite to court action for damages due to wrongful discharge. *Koppal* holds that if local law requires exhaustion, a discharged employee must take his case to the board before going to court. If the railroad is right and a board's determination adverse to an employee is final and deprives courts of power to award damages to the employee, an employee required to exhaust the administrative remedy has no court to take his case after pursuit of his administrative remedy. The railroad can hardly contend that in enacting the 1934 amendments to the Act Congress intended that board determinations adverse to discharged employees should be "final and binding"

and deprive courts of power to determine a wrongful discharge suit only if the discharged employee was not required by applicable state law to exhaust his administrative remedies.

In the *Washington Terminal* case, *supra*, employees had submitted their claim to the board and the carrier appeared and made a full submission on the merits. The board made an award in favor of the employees, who were members of two unions, holding that under their collective bargaining agreement they were entitled to do the work previously done by others. The board ordered the carrier to make the award effective within thirty days. The carrier did not comply, and thereafter filed suit for declaratory relief, seeking adjudication of its rights under the agreement, including whether the agreement, if rightly interpreted, gave the employees the right to do the work in dispute. The carrier also sought an adjudication that the award and order were void. In a two to one decision, the majority held that declaratory relief did not lie and the method of review set forth in the act, namely an enforcement suit by the employees (45 U. S. C. 153, First (p)) was the exclusive method of review.

The carrier had claimed a denial of constitutional rights, because the administrative proceeding did not comply with due process requirements. In answering this contention, the majority said that this would be important if the board's decision was final in the legal sense. However, as the decisions were not final, but the findings and order merely *prima facie* evidence of facts therein stated and enforcement of the award made only in a suit *de novo*, the argument that the administrative proceedings were wanting in due process was cured by the full and complete opportunity given to the carrier in an enforcement

suit to make its defense under all procedural and substantive guaranties of the Constitution.

The carrier further contended that the act balanced the scales of justice unevenly by permitting employees to sue and not giving carriers the same right. In answering this contention, Justice Rutledge clearly recognized that if the "finality" provision was applied literally to a case in which an award was unfavorable to an employee, it might be invalid. At pages 245 and 246, he said:

> "If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might thereafter have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

The *dicta* in the *Washington Terminal* decision should be read in the light of the recent holding of this Court

in the *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company* (1957), 353 U. S. 30, that under the Railway Labor Act, if the parties are unable to reach an agreement with respect to their dispute, either party may refer it to the board, irrespective of the willingness of the other.

Thus, unless a discharged employee refuses to even have his case handled in the usual manner for the purpose of seeing whether an agreement can be reached, and instead sues at once under the *Moore* decision, the railroad can submit the matter to the board even though the employee is unwilling to do so, and if petitioner's contention is correct, an adverse board decision will be the end of the employee's claim. The end result is that unless a discharged employee sues, without attempting to settle the dispute, the railroad can assure itself of two opportunities to have the matter determined in its favor. It can submit the matter to the board and if it prevails, it can contend the determination is "final," and if it loses, it can refuse to pay any money award and defend an enforcement suit by the employee in a suit *de novo* in which the findings of the board would be merely *prima facie* evidence of the facts therein stated. (45 U. S. C. 153 First (p); *Washington Terminal Co. v. Boswell, supra* at 244.)

Congress could not have intended such a patently unfair situation to exist, particularly in view of the fact that the board ". . . consists of a people chosen and paid, not by the Government, but by groups of carriers and large international unions . . . There is no process for compelling the attendance of witnesses or the production of evidence. There is no official record, other than that of the informal pleadings. Hearings are conducted without witnesses. The Board has operated without giving individuals

a chance to be heard unless they were represented by unions." (*Slocum v. Delaware, supra,* dissent, pp. 251, 252.) And if it did, would not such unfairness deprive a discharged railroad employee of his contract rights created under the collective agreement in violation of the due process clause? Surely the denial of judicial review under such circumstances to a defeated employee, but not to a defeated railroad, is manifestly grossly unfair. And if this was the law, would a discharged railroad employee, if he were cognizant of it, attempt to settle his dispute without a law suit, unless he were forced to do for pecuniary reasons? Surely Congress intended to prevent litigation, not to foster it, when it enacted the 1934 amendments.

In *Dahlberg v. Pittsburgh & L. E. R.* (C. A. 3, 1943), 138 F. 2d 121, the question of the finality of an award was presented to the Third Circuit. Employees there brought an action in the district court to enforce an order of the board which, by the board's interpretation of the contract between the carrier and the employees, gave seniority rights to the employees. The carrier urged that the construction of the contract by the board was clearly wrong and the court should refuse to enter an order of enforcement, while the employees contended that the board order was final and binding on the parties and the court was not authorized to review it. The District Court held that the board's interpretation was erroneous and dismissed the complaint. In affirming the dismissal, the court, at page 122, said:

> "In construing a statute, words may not be taken out of their context and endowed with an absolute quality nor may the plan of the entire statute be disregarded in interpreting any single provision. Obviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is

neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

And on page 123, the Court continued as follows:

"If the Act should be interpreted as precluding consideration of the merits by the Court, serious doubts as to its constitutionality would arise. Such interpretation would amount to vesting the Board with full judicial power; and, as was said in a similar but other connection in the dissenting opinion in Washington Terminal Co. v. Boswell, 75 U. S. App. D. C. ; 124 F. 2d 235, 276, 'There can be no valid delegation of governmental power to non-governmental agencies.' Carter v. Carter Coal Co., 1936, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160. The Adjustment Board, consisting of bi-partisan group paid by and set up to represent the employees and carriers respectively, is not a governmental agency.

"If it could be assumed that the Adjustment Board was a governmental agency still other doubts as to the Act's constitutionality would be present, for example, the question whether there is such a lack of safeguards in the procedure before the Board as to amount to a denial of due process, there being no court review of the merits. This point was dealt with by Justice Rutledge in the Washington Terminal Co.

v. Boswell, supra, as follows: 'Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality.'

"The reason for the choice of the words 'final and binding' will appear from the history of legislation providing for mediation of railway labor disputes. Under both the act of May 20, 1926, 45 U.S.C.A. §§ 151 et seq. and the Transportation Act of 1920, 41 Stat. 456, as well as the system of labor mediation which was created during the first world war when the railroads were under federal control, the board had advisory powers only. See Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536. Under the Act of 1926 their awards could be given some practical effect, but only by stipulation. These provisions were not entirely successful and it is plain that the words in question adopted by the framers of the Act of 1934 makes the decisions of the Board more efficacious than mere private advice. In this, however, there cannot be found an intention to invest them with the force of unappealable decisions."

The railroad cites four lower court decisions as authority for holding the finality language precludes this action. *Reynolds v. Denver & R. G. W. R. Co.* (C. A. 10, 1949), 174 F. 2d 673; *Weaver v. Pennsylvania R. Co.* (C. A. 2, 1957), 240 F. 2d 350, affirming *per curiam,* 141 Fed. Supp.

214; *Bower v. Eastern Airlines, Inc.* (C. A. 3, 1954), 214 F. 2d 623; and *Barnett v. Pennsylvania-Reading Seashore Lines* (C. A. 3, 1957), 245 F. 2d 579.

In *Reynolds v. Denver & R. G. W. R. Co., supra,* an engineer sued for reinstatement, damages for lost wages, and restoration of seniority rights. The Tenth Circuit said that the words "final and binding" were clear and could only be construed to mean final and binding and it was without power to grant the relief sought.[3] However, the Court must have entertained doubts, because despite so holding, the Court first did examine into and "carefully analyzed" the evidence submitted in the trial court and concluded that the finding of the District Court that the employee was not wrongfully discharged because of his conduct and acts, was supported by the record.

In *Weaver v. Pennsylvania R. Co., supra,* the finality clause of the Railway Labor Act was not involved, but rather the disputes clause of a collective agreement which provided that the decisions of the system board "shall be final and binding upon all parties to the dispute." And although the District Court expressed doubt as to whether or not it had power to review the judgment of the system board, it nevertheless examined the entire record and expressed its firm conviction that the plaintiff had been dealt with fairly and properly.

In *Bower v. Eastern Airlines, supra,* the disputes clause in a collective agreement, similar to the one involved in the *Weaver* case, was in issue, and the Court held that the decision of the system board was final because of the

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[3]Under *Slocum v. Delaware,* 339 U. S. 239, decided almost a year after *Reynolds,* it would seem that the board's jurisdiction to grant the relief sought was exclusive.

agreement of the contracting parties. Of significance here is the statement of the Court that plaintiff "sought and obtained from that Board a decision on the merits of his case."

In *Barnett v. Pennsylvania-Reading Seashore Lines, supra*, the plaintiff sought, through an injunctive order, reinstatement and compensation for loss of earnings and pension rights. Although under *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, the board would have exclusive jurisdiction and the District Court so held, 145 Fed. Supp. 731, the Third Circuit held that plaintiff was not entitled to "challenge the decision reached by the Board on the merits of the plaintiff's claim," because of the decisions, some of which relied on the finality clause, one on *res judicata* and some on election of remedies. The Court did not say upon which theory it relied.

In *Barnett*, the employee contended that if the act was construed to make the award conclusive, it would violate the Fifth Amendment by denying judicial review to defeated employees though allowing it to defeated employers. The Court said that if Barnett had been bound to submit his claim to the board there would be discrimination, but as he was not bound to do so there was no violation of constitutional rights. If the Court in *Barnett* had known that the railroad could submit the controversy to the board, despite the unwillingness of the employee (*Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company, supra*), it might very well have decided that the act was unconstitutional if an employee who lost before the board was thereafter barred from court.

It is the contention of respondent that the remedy created by Section 3 of Title 1 of the Railway Labor Act is merely an administrative remedy and a discharged em-

ployee, under the *Moore* decision need not exhaust it unless he desires to do so or exhaustion is required under local law. (*T. W. A. v. Koppal, supra.*) That if a discharged employee does exhaust the remedy, he may thereafter sue for damages, and the only matters ruled on by the board that are "final and binding" are those which involve questions of future relations between the railroad and its employees, and which are within the exclusive primary jurisdiction of the board. (*Slocum v. Delaware, L. & W. R. Co., supra.*)

B. The Doctrine of Election of Remedies Is Not Applicable.

The railroad (pp. 22, 23) has pounced upon some of the language in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, and *T. W. A. v. Koppal*, 345 U. S. 653, and upon that basis appears to contend that this Court intended to make the doctrine of election of remedies applicable to the situation here present.

In *Slocum*, it was held that a state court did not have power to adjudicate a dispute between a railroad and a labor union involving the interpretation of collective agreements as to their scope because the Railway Labor Act conferred exclusive jurisdiction upon the board to determine such dispute. In its opinion the Court distinguished the *Moore* case by stating merely that a common law action for wrongful discharge did not involve questions of future relations between the railroad and its other employees, and therefore the board did not have exclusive jurisdiction over a wrongful discharge controversy. The case did not hold or even discuss any question with respect to an election, although it did, in a footnote (7) indicate that its decision was to have no implications with respect to "judicial proceedings to review board action or inaction."

T. W. A. v. Koppal, supra, held that where local law required exhaustion, a discharged railroad employee was required to take his case to the board before filing a suit in court. No question of election was presented to the Court or discussed. All the Court did, after stating that local law required exhaustion, was to quote from *Moore* that the Railway Labor Act did not take away from the courts the jurisdiction to determine a wrongful discharge suit or to make an administrative finding a prerequisite to filing a suit in court, quote its amplification of the *Moore* statement in the *Slocum* opinion, and hold exhaustion was necessary.

It is submitted that this Court in both *Slocum* and *Koppal* did not intend, by stating that Moore could pursue either the administrative remedy or sue in court for damages, to make the election doctrine apply. The issue of election of remedies was not before the Court in either case. To hold that a person who exhausts an administrative remedy has made an irrevocable election, and he is thereby precluded from seeking relief in court, would result in greater confusion with respect to the doctrine of exhaustion of administrative remedies than now exists.

Aside from decisions dealing with the Railway Labor Act, the railroad has cited two cases only in which it was held that the pursuit of the administrative remedy was an election. (*Pennsylvania R. Co. v. Clark Coal Co.* (1915), 238 U. S. 456, and *Baltimore and Ohio R. Co. v. Brady* (1933), 288 U. S. 448.) In both cases it was held that there was an election because of the specific language of Section 9 of the Interstate Commerce Act (49 U. S. C. 9)

which provides that a complaint can be made to the Interstate Commerce Commission or by suit for damages, but not both. And the fact that Congress, in enacting the 1934 Amendments to the Railway Labor Act, did not use language of similar import, in respondent's view, lends considerable support to his position that no election was intended or should be held to exist.

With respect to the cases decided by lower courts under the Railway Labor Act, and cited by petitioner as authority for the election doctrine, each of which will be referred to in Point II hereof, except *Austin v. Southern Pacific Company* (1942), 123 P. 2d 39,[1] respondent desires to point out that they rely upon the "final and binding" language to make the board's ruling final so as to invoke the election of remedies doctrine. (*Michel v. Louisville & Nashville R. R. Co.* (C. A. 5, 1951), 188 F. 2d 224, 226, 227; *Majors v. Thompson* (C. A. 5, 1956), 235 F. 2d 449, 452; *Woolley v. Eastern Air Lines* (C. A. 5, 1957), 250 F. 2d 86, 90, 92.)

Accordingly, if the "finality" language of the act is not entitled to the construction contended for by the railroad, it would seem that the premise upon which the above cited decisions rely, disappears and as a result the railroad has failed to cite any authority for holding that the exhausting of an administrative remedy is an election except where the statute creating the administrative remedy so provides.

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[1]In *Austin v. Southern Pacific Co.*, the Court first found that the complaint failed to allege a cause of action on grounds separate and distinct from election of remedies.

II.

Assuming That Section 3 First (m) of the Railway Labor Act Should Be Construed So as to Accord "Finality" to a Determination That an Employee Was Not Discharged in Violation of Provisions of a Collective Bargaining Agreement, the National Railroad Adjustment Board Made No Determination.

The merits of respondent's submission to the board was whether under the terms of the collective agreement and the circumstances of the case, the railroad could discharge Price because of his return from Nipton to Las Vegas for the purpose of eating. This question was clearly presented to the board [R. 9, 10, 42-46]. The railroad does not appear to challenge that this was the merits, except to argue that what "may appear to be the 'merits' of a dispute to one judge may not be considered to be such by another" [R. 35, 36]. However, the railroad contends that the board found against Price on the issue.

In denying the claim, the board said:

> "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. *Claimant was found to have wilfully disobeyed his orders.* This was insubordination and merited discipline.
>
> "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. *Thus, the only question for review is whether there was substantial compliance with the investigation rule.*
>
> "Basically, the complaint is that the hearing was held when the claimant was not present." [R. 57.] (Emphasis supplied.)

Nothing else was said by the board with respect to the issue of Price's return to eat. Under the circumstances, is it any wonder that the Court below stated:

> "It therefore appears that the Board made no determination on the merits of Price's complaint. The Board neither found nor concluded that the railroad was entitled to discharge Price. The written decision of the Board does not even mention this issue other than to report that 'claimant was found to have wilfully disobeyed his orders.' The finding thus reported was obviously not its own, but that of the superintendent of the railroad.
>
> "The reason that the Board did not deal with the merits of the controversy is that it believed, as stated in its decision, that 'the only question for review is whether there was substantial compliance with the investigation rule.' This was a plain misconstruction of Price's submission to the board, since he had specifically presented the question on the merits." [R. 105, 106.]

Assuming Section 3 First (m) is entitled to the construction claimed by the railroad, should the determination of the board under the circumstances of this case be held to deprive Price of his valuable contract rights? Here Price was suspended by the assistant superintendent and ordered to report the following morning for investigation and hearing [R. 12, 13]. A one day postponement was granted, and when a further postponement was asked so that Price's representative could be present, the assistant superintendent granted one for five hours only, and told him to get another representative [R. 16, 17]. When Price did not appear, the assistant superintendent ordered the hearing to proceed [R. 17], called only witnesses for the railroad [R. 16, 17, 19, 24, 26], and closed the hearing

without seeking evidence or witnesses in Price's behalf [R. 29]. There is no transcript of the proceedings. The only record is a series of brief questions and answers prepared by the clerk of the assistant superintendent [R. 12-29].

Should a finding of disobedience by the assistant superintendent only under such circumstances deprive Price of his common law remedy to sue for wrongful discharge?[5]

In almost every wrongful discharge decision cited by the railroad in which the board decision was held to be final or the doctrine of election of remedies involved, the court indicated that the board determined the case on the merits or the court itself agreed with the findings of the board that the employee was properly discharged. See discussion of *Reynolds v. Denver & R. G. W. R. Co., Weaver v. Pennsylvania R. Co., Bower v. Eastern,* and *Barnett v. Pennsylvania, supra,* under respondent's Point I, A.

In *Michel v. Louisville & N. R. Co.* (C. A. 5, 1951), 188 F. 2d 224, 225, 227, the plaintiff brought an action for wrongful discharge against a carrier, claiming the discharge constituted a violation of the collective agreement. The Court, on pages 224 and 225, said:

> "The primary question in the case is whether the voluntary submission of the employee's claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee's contentions, presented a bar

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[5]It is entirely possible that the peremptory disposition of the matter by the assistant superintendent was the result of the controversy between the railroad and Price's brotherhood over the detraining of swing brakemen at Nipton [R. 38-41, 43].

to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages . . ."

As the board had held that "the dismissal of the Claimant was justified by the showing made," the Court held, page 227, that:

> "It follows therefore that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim."

Majors v. Thompson (C. A. 5, 1956), 235 F. 2d 449, cited *Michel* as authority for holding the decision of the board final and an election present. And in *Woolley v. Eastern Airlines* (C. A. 5, 1956), 250 F. 2d 86, the Court quoted from *Majors*, relying on *Michel*, and then went on to state that the decision of the board was final and binding, but that if this view was untenable, it nevertheless found that on the record the finding of the District Court that the decision of the board was fully supported and thus was not reviewable on the merits was correct.

And in *Kelley v. N. C. & St. Louis Ry.* (E. D. Tenn., 1948), 75 Fed. Supp. 737 (not relied on by petitioner), a discharged locomotive engineer sued for wrongful discharge. The defendant railroad moved for summary judgment on the ground that the plaintiff had voluntarily carried his claim before the Railroad Adjustment Board to final hearing and the board had the matter under ad-

visement. In granting the motion for summary judgment, the Court stated:

> "This adjudication is made with the understanding that the plaintiff has a petition and record before the Adjustment Board to which the defendant has appeared and made defense, all to the end that the Adjustment Board has taken jurisdiction to and will determine the grievance upon its merits. The plaintiff must have a hearing on the merits, either before the Board or in this court . . ."

Petitioner relies upon *United States v. Oregon Lumber Co.* (1922), 260 U. S. 290, as holding that an election occurs without regard to the result of the first proceeding. Not only were two judicial remedies involved in that case, but the Court there held that the election became final by the fact that the United States, in an action to cancel for fraud a patent for public lands, upon ascertaining from defendants' plea that they intended to rely upon the statute of limitations, deliberately chose, instead of abandoning that suit and bringing an action at law where the statute of limitations would not apply, to proceed with the original case upon the issues as they stood and to follow it to a final determination. The Court also stated that the determination of the equity action on the basis of statute of limitations was on the merits.

The railroad sets forth in Appendix B to its brief an interpretation of its award made November 26, 1958, five and a half years after its original award. This interpretation was made upon the request of the railroad, despite the fact that the Court below stated there "was here no dispute 'involving an interpretation of the award' as those words are used in the statute" [R. 106].

The respondent submits that he is entitled to have his case determined on the merits in the District Court.

Conclusion.

For the reasons stated herein, the respondent respectfully prays that the judgment of the Court of Appeals below be affirmed.

Respectfully submitted,

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